FILED

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JAMES R. BROWNING, Clerk

No. 802

IN THE

Supreme Court of the United States

October Term, 1958

W. B. CRABTREE,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS FOR THE STATE OF OKLAHOMA

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Petitioner, W. B. Crabtree, prays that a writ of certiorari issue to review the judgment of the Criminal Court of Appeals for the State of Oklahoma, entered in the above entitled case on November 17, 1958.

Citations to Opinion Below

The opinion of the Criminal Court of Appeals for the State of Oklahoma is reported at —— Okl. Cr. ——, —— P. 2d ——, and is printed in Appendix A, infra.

JURISDICTION

The opinion of the Criminal Court of Appeals for the State of Oklahoma was entered on September 24, 1958. Within the time permitted by law, a petition for rehearing

was filed. On October 29, 1958, the Court entered an order denying the petition for rehearing, Judge Nix dissenting. On November 5, 1958, Petitioner herein, filed a Motion to Stay Mandate Pending Application for Leave to File a Second Petition for Rehearing and Supporting Brief and Motion to Withdraw and Correct Erroneous Opinion. On November 17, 1958, the Criminal Court of Appeals issued an order withdrawing and correcting the opinion previously rendered on September 24, 1958. The correction was substantial in nature, for Petitioner's contentions would be of less merit, had the correction not been made. The Presiding Judge of the Criminal Court of Appeals for the State of Oklahoma has certified that the opinion as finalized was filed November 17, 1958. See Exhibit B attached hereto. See also *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211, 97 L. ed. 245.

On February 16, 1959, Mr. Justice Whittaker of this Court signed an order extending the time within which to file a petition for writ of certiorari in the above captioned cause to and including March 28, 1959, ". . . provided the statutory time has not already expired."

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

Question Presented

Was Petitioner denied due process of law under the Fourteenth Amendment to the Constitution of the United States, where the trial court failed to admonish the jury prior to a recess, no admonition having been given theretofore, and when called to its attention failed to question the jurors, all contrary to 22 Oklahoma Statutes, 1951, Section 854, as said statute has been interpreted by the highest Court of the State of Oklahoma.

Statute Involved

The statutory provision involved is 22 Oklahoma Statutes, 1951, Section 854 which provides:

> The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon, until the case is finally submitted to them.

Statement

On September 17, 1956 an information was filed charging the Petitioner with having assaulted with intent to kill, one, A. J. Garnett in the City of Drumright, State of Oklahoma on the 6th day of July, 1956 (R. 7, 8). Thereafter, on December 9, 1957 the cause came on for trial (R. 18, 25).

Following the disposition of a motion for a continuance, the jury panel was sworn; answered questions on voir dire; voire dire examination of jurors called was had; a jury was selected and duly sworn to try the cause (R. 25). The following then occurred:

> . . . and thereupon, the Court Reporter being out of the courtroom and making no record as to the Court's admonition to the jury, the Court announced a short recess, during which recess the following record was made out of the presence of the jury, to-wit: (R. 25, 26).

Counsel for the Defendant objected to the continuing of the trial because of the failure of the Court to admonish the jury prior to leaving the bench. The objection was overruled and an exception noted (R. 26). On the same day, the jury returned a verdict of guilty of assault with intent to do bodily harm (R. 118). On January 7, 1958

the Petitioner herein was sentenced to serve three years in the penitentiary of the State of Oklahoma (R. 122). On the 17th day of December, 1957, Petitioner herein, through counsel, filed a motion for a new trial based among other points on the failure of the Court to admonish the jury before taking a recess (R. 119, 120). On January 7, 1958 the motion for new trial was argued; overruled; and defendant excepted to the ruling thereon (R. 124).

On appeal to the Criminal Court of Appeals this point was again raised. In its opinion the Criminal Court of Appeals held that there was a presumption that court officials act correctly and inasmuch as the record does not conclusively show that the Court failed to admonish the jury, the decision was affirmed, Judge Nix dissenting on this point. (Appendix A). The majority opinion indicated that the record reflected that some admonition was given.

Petitioner herein, then filed a petition for rehearing which subsequently was denied. In his petition he sets forth (on page two of said petition) that the interpretation placed by the Court on what actually occurred, together with its presumption of regularity deprived Petitioner of due process of law under the Constitution of the United States. On November 17, 1958, the Court ordered its opinion withdrawn and corrected the same. This, undoubtedly resulted from the motion of November 5, 1958 filed by counsel for petitioner herein requesting such relief.

Reasons for Granting Writ

Admonishment to petit juries, prior to adjournments and recesses has been a matter of concern in both federal and state courts in recent times. See *Carter* v. *United States*, 252 F. 2d 608, 102 U.S.App. D.C. 227, 230, 23[illegible] This concern has been motivated by an attempt to grant to defendants in criminal cases the fairest trial possible.

The legislature of the State of Oklahoma, has seen fit o require the courts of that state to admonish petit juries before adjournments. See 22 Oklahoma Statutes, 1951, Section 854. In interpreting this statute the Criminal Court of Appeals for the State of Oklahoma has held in *Rutherford* v. *State*, 95 Okl. Cr. 311, 245 P. 2d 96, at page 106, that at every adjournment and at every separation, in criminal trials, the court must admonish the jury as required by statute. A brief recess necessitates only a brief admonishment with perhaps reference to the fuller one theretofore given by the Court. The Court further held that the failure to so admonish required a new trial.

The Criminal Court of Appeals in the instant case, reaffirmed their holding in *Rutherford* v. *State*, supra, but concluded from the facts with the aid of a presumption that an admonition to the jury had been given. The transcript reflects (R. 25) that the Court Reporter being out of the room made no record as to the Court's admonition to the jury. Thus it seems clear that the Court Reporter did not know whether or not an admonition was given, of his own knowledge. An objection was immediately made but overruled by the Court. The jury was not interrogated. (R. 26). The issue was again raised on motion for new trial; and on appeal. At no time did either the Court or the prosecutor attempt to indicate that an admonition to the jury was in fact given. On the other side, a member of the bar made an objection; reiterated the same in a motion for new trial; argued an appeal on the same point; and filed an affidavit alleging that no admonition was given by the Court to the jury, as an exhibit attached to a petition for rehearing. In the face of such evidence, the Criminal Court of Appeals relied on a presumption of regularity since there was no clear or convincing proof to the contrary.

The validity or invalidity of a presumption, or the use thereof, has previously engaged the attention of this Court, see *Morissette* v. *United States*, 342 U.S. 246.

But for the presumption indulged in by the Criminal Court of Appeals, this case would be of importance probably only to the Petitioner herein. The Criminal Court of Appeals through its erroneous use of the presumption of regularity by Court officials deprived Petitioner herein of due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

Conclusion

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD L. CAREY
WALTER E. GILLCRIST
Counsel for Petitioner

March 28, 1959

APPENDIX A

FILED
IN CRIMINAL COURT
OF APPEALS
OF OKLAHOMA
Sep 24, 1958
ANDY PAYNE, CLERK

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

No. A-12589

W. B. CRABTREE, PLAINTIFF IN ERROR

vs.

THE STATE OF OKLAHOMA, DEFENDANT IN ERROR

SYLLABUS

1. By the provisions of 22 O. S. 1951 § 854, it is the duty of the trial court to admonish the jury as to the conduct of its members at each adjournment of the court, whether permitted to separate or kept in charge of officers, and to admonish it that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express an opinion thereon, until the case is finally submitted to them.

2. There is a presumption that officers perform their duties in the manner prescribed by law, and where it is contended that there is non-compliance with certain statutory provisions, it is incumbent upon the one making such assertion to introduce evidence to support his contention.

3. Where following voir dire examination the jury is sworn, and prior to the reading of the information to the jury and opening statement by County Attorney, a short recess is called, and the minute of the court is to the effect that "The court reporter being out of the court room and making no record *as to the court's admonition to the jury*, the court announced a short recess", and during which recess the following record was made out of the presence of the jury: (By defense counsel) "If your honor please, at this time comes now the defendant and objects to the continuing of this trial at this time, upon the grounds and for the reason that prior to and during the last recess there was no admonition to the jury concerning their conduct during the recess of the case", and where the court overruled such motion for mistrial; HELD that in absence of proof to the contrary and in view of the wording of the minute, the assumption is that the court properly admonished the jury and the ruling of the court did not constitute error.

4. Where the record is silent as to the defense outlined to the jury by counsel for the accused in his opening statement, and the evidence offered by the defendant is not clear that a claim of self-defense was presented in his behalf, while the evidence of the State and the physical facts of the wounding of a second person in addition to the prosecuting witness refute such defense, and the record does not show that any such defense was ever interposed, and no instruction covering self-defense was ever offered, HELD that in view of the instructions actually given, the court did not err by failure to give an instruction on self-defense.

APPEAL FROM SUPERIOR COURT OF CREEK COUNTY, OKLAHOMA, DRUMRIGHT DIVISION

G. B. CHUCK COYELL, *Judge.*

W. B. CRABTREE was convicted of the crime of assault to do bodily harm, and appeals.

AFFIRMED

COLLINS & MOORE, SAPULPA, Oklahoma, Attorneys for Plaintiff in Error.

MAC Q. WILLIAMSON, Attorney General.

SAM H. LATTIMORE, Ass't Att'y General,
Attorneys for Defendant in Error.

POWELL, JUDGE:

W. B. Crabtree, plaintiff in Error, hereinafter referred to as defendant, was charged in the Superior Court of Creek County, Drumright Division, with intent to kill, and convicted of the included offense of assault to do bodily harm, and was by the court sentenced to serve a term of three years in the State Penitentiary.

For reversal counsel argue his case under two propositions;

(1) "The court failed to properly instruct the jury as to the law of self-defense.

(2) "The court allowed the jury to separate and mingle with bystanders in the court room without giving the statutory admonition as to conduct to the jury."

Considering the last proposition first, we have carefully examined the case-made to discover therefrom what actually transpired, and if the record would support the conclusions set out in the proposition presented.

From the record we find that when the within case was called, counsel for the defendant sought a continuance and presented some evidence in support of his motion; that the court refused to grant a continuance, and the selection of a jury commenced and the jury was selected and sworn. The minutes show that: "The court reporter being out of the room and making no record as to the court's admonition to the jury, the court announced a short recess."

The above minute would indicate that the court had actually admonished the jury, which means in accordance with 22 O. S. 1951, § 854, reading:

> "The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon, until the case is finally submitted to them."

The minute further shows that while the jury was out counsel for defendant made the following record:

> "Mr. Moore: If your Honor please, at this time comes now the defendant and objects to the continuing of this trial at this time upon the grounds and for the reason that prior to and during the last recess there was no admonition to the jury covering their conduct during the recess of the case.
> "By the Court: Overruled."

After this ruling the county attorney read the information to the jury and outlined to them the State's case, to which the defendant had entered a plea of not guilty. Following this, the rule was asked, the witnesses were sworn and evidence in the case was heard by the jury.

The general rule is that the burden rests upon a proponent of a motion to support the same by evidence, unless the purported facts are admitted. Here the minute is in conflict with the asserted facts of the motion. The minute indicates that some admonition by the court to the jury was made, but just what, we are not advised, because the minute says that the court reporter was not in the room when the admonition was made. We must presume, in the absence of evidence to the contrary, that the court actually advised the jury, as the court is presumed to follow the law. As said in Galbert v. State, Okl. Cr. 278 P 2d 245:

> "There is a presumption that officers perform their duties in the manner prescribed by law and where it is contended that there is non-compliance with certain statutory provisions, it is incumbent upon the one making such assertion to introduce evidence to support his contention."

It is stated in 22 C. J. S. (Cr. Law), § 859:

> "In the absence of proof to the contrary, the proceedings of courts properly exercising criminal jurisdiction are presumed to be regular, and the mere failure of their records to show this does not overcome the presumption * * *."

See also Ex parte Owens, 82 Okl. Cr. 415, 422, 171 P 2d 868, and cases cited.

If perchance the court did not actually admonish the jury, counsel for the defendant should have called such fact to the attention of the court at the instant the jury arose to leave the room, if it did leave, so that the court would have had opportunity to give the admonishment. It is apparent that counsel was more interested in a mistrial than in the enforcement of the precautionary measures to prevent a ciolation of the statutory provisions quoted.

Under the state of the record, we do not find where any substantial right of the defendant had been violated in the respect complained of.

The principles of law with reference to admonition of juries, set out in Rutherford v. State, 95 Okl. Cr. 311, 245, P. 2d 96, cited by both the defendant and the State, is adhered to and we consider nothing that we have said herein contrary thereto.

• • • • •

The verdict and judgment appealed from is, accordingly, affirmed.

Brett, P. J., concurs.

Nix, J., Dissents.

NIX, JUDGE (dissenting)

A close examination of the record precludes me from agreeing with Judge Powell's conclusion that defendant's contention, that the trial judge failed to admonish the jury as required by statute, was erroneous. The transcript of the record which was sworn to as being a full, true and correct transcript of all the proceedings, does not reveal that such admonition was given. However, the transcript does reflect that after the jury was permitted to separate, the defense counsel made the following motion:

> "If your honor please, at this time comes now the defendant and objects to the continuing of this trial at this time upon the grounds and for the reason that prior to and during the last recess there was no admonition to the jury covering their conduct during the recess of the case."

This motion was overruled without comment.

The defendant in a motion for a new trial again charged that the trial judge allowed the jury to separate without admonishing the jury. This motion was overruled without comment, or denial of the allegation. The fact was never denied by the trial judge. The state's attorney made no denial in their brief. The transcript of the record showed no admonitions. The authors of the majority opinion justify their conclusion upon a notation in the minutes as follows:

> "The court reporter being out of the room and making no record as to the court's admonition to the jury, the court announced a short recess."

This they say, was sufficient for them to conclude that the trial judge gave the required admonition. I cannot subscribe to such conclusion. I cannot lead myself to believe that a reputable attorney of the bar would subject himself to the hazard of making false accusations upon which to base his appeal. Neither can I concur in such conclusion when the record substantiates the defendant's allegations. It appears to your writer that had said allegation been unfounded, the trial judge would have refuted the allegation by so stating in the record. I am of the opinion that when the question was raised on a motion for new trial that the court again passed up the opportunity to correct the attorney for the defense had the allegation not been true. The attorney general in his brief evidently did not so conclude as he did not attempt to deny the defendant's contention, but attempted to justify it. In the majority opinion Judge Powell quoted with approval and adherred to the findings in the case of Rutherford v. State, 95 Okl. Cr. 311, 245 P 2d 96, and made clear his desire that nothing stated in the majority opinion was to be considered contrary thereto.

In that case the court said:

> "It is therefore our conclusion that a court, at every separation of the jury and at each adjournment in

a criminal trial should give the statutory admonition and at least an abbreviated admonition referring to the previous full admonition at each temporary cessation of proceedings, but where it appears, as here, that at the first adjournment, and before any separation of the jury was had, the court had given the statutory admonition, and that the admonition was duly given at each adjournment thereafter, and the record discloses a trial otherwise fair and impartial, the judgment will not be reversed simply because during the session of the court a temporary intermission or recess while the attorneys retired with the judge to his chambers to consider the admissibility of certain documentary evidence offered by defendant took place without the admonition being given as a preliminary thereto.

"If the court had failed either prior to the argument in his chambers, had the same been called to his attention, of admonishing the jury, or had on reconvening of the court failed to question the jurors as to any impropriety then such failure would have properly constituted *a ground for new trial* and on hearing of motion the rules announced in the Brink and Redman cases would probably have applied, and the burden would have been on the State to have shown that no impropriety took place."

This, and similar decisions of this Court state the established rule. They are based upon similar violations of the statute which I reiterated, 22 OSA 854:

"The jury must also, at each adjournment of the Court whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with any one else on the subject connected with the trial, or to form or express any opinion thereas, until the case is finally submitted to them."

It is obvious to your writer that the judge failed to comply with this section of our statutes. Thus, the statute was violated. Under many holdings of this court with references to jurys, when the statute is violated it is

presumed that the defendant was prejudiced thereby, and the burden is then upon the state to prove otherwise. The error may have been cured had the trial judge, upon the jurors return to the box, made such inquiry as to show a lack of prejudice; however, he did not do. This court said in Ridley v. State, 5 Okl. Cr. 522, 115 P 628:

> "It is of the utmost importance that jurors and court officials should be held to a strict observance of the provision of the law prescribing their procedure and duties, and their conduct should be such that no possible suspicion can attach to them of having acted in a manner prejudicial to the accused, or in his favor * * * Courts cannot be too strict in compelling rigid and vigilant observance of the provisions of the statute designed to preserve inviolate the rights of trial by jury and the purity of jury trials."

It has long been recognized that the great element of distinction between us in the enemies of democratic form of government is trial by jury. It must not only be preserved but rigid enforcement must be exemplified in maintaining the safeguards surrounding its sanctity. These safeguards must never be relaxed as to case suspicion thereon. Its cloak of purity must at all times be kept clean. The statute did not intend that a jury could leave the jury box and court room and mix and mingle with the people and crowd usually present without first being admonished, that it is their duty not to talk among themselves or with any one else about the trial or to form or express any opinion. The statutes, are clear and concise. It was enacted for a good purpose. A violation should not be made an exception. It should be strictly complied with in every instance. To affirm the instant case would be the first step in gradually pulling away from the general rule and opening the gate for future exceptions to further confuse the issue.

BRETT, P. J. CONCURS:

The sole proposition that prevents unanimity in the case at bar is, did the trial court admonish the jury when declaring a recess. I could readily agree with what my learned associate recites in his dissenting opinion, if the record affirmatively supported his conclusions. But it is not so established in the record. It does not appear that the court did not admonish the jury during the recess in question, not to talk about the case among themselves or permit others so to do. If the record so showed, then under a long line of decisions we would be compelled to reverse this case.

The record merely shows that the reporter was momentarily not present when the recess was announced. His notes reveal this minute: "The court reporter being out of the room and making no record of the court's admonition to the jury, the court announced a short recess." The writer is of the opinion that the language in the minute readily supports the presumptions long indulged by this court, that where the record does not affirmatively disclose the doing of something which was its duty to do, in the absence of proof to the contrary, every presumption favors the regularity of the proceedings. Such is the situation in the case at bar. It does not affirmatively appear that the trial court did not admonish the jury—it only appears that the reporter was absent if and when the same took place. The burden was on the appellant to show that the trial court gave no admonition to the jury. Galbert v. State, Okl. Cr., 278 P 2d 245. And see 22 Okl. St. Ann 859. If no such admonition was given, it was the duty of counsel to immediately dictate such fact into the record, and in the absence of the jury, he should have offered affirmative proof by witnesses, court attaches, etc., that no such admonition was given. There is nothing in the record except the heretofore recited minute, to sustain the conclusion set forth in the

dissent. To support the conclusion reached we must presume error. This court has repeatedly said error will never be presumed, but must affirmatively appear in the record. Wilson v. State, 3 Okl. Cr. 714, 109 P 289; Anderson v. State, 8 Okl. Cr. 90, 126 P 840; Edwards v. State, 0 Okl. Cr. 306, 131 P. 956; Alexander v. State, 35 Okl. Cr. 89, 248 P. 873; Bynum v. State, 40 Okl. Cr. 352, 268 P. 993; Kennamer v. State, 59 Okl. Cr. 146, 57 P. 2d 646; Nowlin v. State, 65 Okl. Cr. 165, 83 P. 2d 601; Denmark v. State, 71 Okl. Cr. 424, 112 P. 2d 117, 437.

To follow the dissenting opinion it would be necessary to violate this time honored rule.

• • • •

APPENDIX B

CERTIFICATE

I, JOHN C. POWELL, Presiding Judge of the Oklahoma Criminal Court of Appeals since January 12, 1959, certify that following the rendering of an opinion in case No. A-12,589, W. B. Crabtree v. The State of Oklahoma, on September 24, 1958, a petition for rehearing was filed on October 9, 1958, within the fifteen days time provided by rule of Court, and that on October 29, 1958 the petition for rehearing was denied, with Nix J., dissenting. A second petition for rehearing was not filed, but on November 5, 1958 the then Presiding Judge of this Court issued an order staying the issuance of mandate. However, on November 17, 1958 the majority of the Court being convinced that lines 10 and 11 of page 5 of the opinion should be eliminated by a new page omitting the two sentences in question, an order by the then Presiding Judge was entered accordingly and the opinion as thus finalized was filed on December 2, 1958. Notice of intention to apply for writ of certiorari and motion to stay mandate was filed. On February 6, 1959, costs not having been advanced for preparation of record, mandate was issued, but was recalled on February 12, 1959 by reason of the costs having been advanced to the Clerk of this Court for preparation of record.

This Court considered its final action as to the opinion, where there had been a dissent, to have been on November 17, 1958, the date of the refiling of the corrected opinion.

JOHN C. POWELL,
Presiding Judge.

attest:

ANDY PAYNE,
Clerk.

By Ethel C. Hammett, Deputy.